



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER

NEWFOUNDLAND AND LABRADOR

A-2022-006

May 19, 2022

Department of Industry, Energy and Technology

Summary:

The Department of Industry, Energy and Technology received a request for documents related to the acquisition of the Come by Chance refinery. The Third Party was notified of the Department's intention to release the records and subsequently objected to the release of certain information contained within a memorandum of understanding. The Third Party filed a complaint with this Office, claiming that the information must be withheld under section 39 (disclosure harmful to business interests of a third party). The Commissioner found that the burden of proof had not been met and recommended that the information be released.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1.2, sections 19 and 39.

Authorities Relied On:

[OIPC Guidance Business Interests of a Third Party \(Section 39\)](#).

I BACKGROUND

[1] The Department of Industry, Energy and Technology (“IET”) received two related access requests pursuant to the *Access to Information and Protection of Privacy Act, 2015* (“ATIPPA, 2015” of the “Act”) as follows:

1. *All documents, emails, memos, briefing notes and reports related to [named company’s] acquisition of Come By Chance Refinery Jan. 1 to present. Please omit media clippings.*
2. *Records related to any agreements between the department/government and [three named companies] as announced on Nov. 30, 2021, with respect to Come By Chance. Request includes any related and/or supporting documentation, addenda, appendixes, etc.*

[2] A package of responsive records was provided to the Applicant; however, IET determined that a memorandum of understanding (“MOU”) may contain third party business information subject to section 39 of *ATIPPA, 2015*. The MOU was not provided to the Applicant and, in accordance with section 19 of *ATIPPA, 2015*, IET notified the parties to the MOU (collectively the “Third Party”) of the decision to release the requested records. The Third Party filed a complaint with this Office opposing IET’s decision.

[3] As informal resolution was unsuccessful, the complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*.

II THIRD PARTY’S POSITION

[4] The Third Party argued some of the information contained in the MOU was required to be protected from disclosure pursuant to section 39 of *ATIPPA, 2015* in order to protect its business interests. The Third Party specifically sought to have information related to its commercial or financial interests severed pursuant to section 39(1)(a)(ii).

[5] The Third Party acknowledges that information contained in a negotiated agreement with a public body is typically not considered to be “supplied” as required by section 39(1)(b), which is the second part of the three-part test imposed by section 39; However, it argues that the requested redactions fit into an exception for information that would allow for an accurate

inference of non-negotiated third party business information. In particular, it argues that the release of the information would allow for the calculation of the Third Party's net income, which it argues is the most sensitive information for a private company. It argued that an accurate calculation of the net income would cause significant harm to its competitive position and would significantly interfere with their negotiation position. The Third Party claims that this would be incredibly prejudicial to the viability of the company.

III PUBLIC BODY'S POSITION

- [6] From previous discussions with the Third Party during the creation of the MOU, IET knew that the Third Party was opposed to the release of certain portions of the document; therefore, upon receipt of the request IET informally contacted the Third Party regarding its plan to release the MOU in its entirety. As an agreement could not be reached, IET determined that this was an appropriate case for a section 19 notice.
- [7] IET agreed with the Third Party that one piece of information contained in the MOU met the test in section 39 of *ATIPPA, 2015*; However, IET does not believe that the additional information the Third Party proposes to have withheld, meets that test. The main argument is based on guidance from the ATIPP Office and this Office which states that information found in a negotiated contract or other similar document has not been "supplied" as required by section 39(1)(b) of *ATIPPA 2015*. As the MOU is a negotiated contact, the contents cannot be considered to have been "supplied".
- [8] Additionally, regarding the Third Party's assertion that the information should be withheld as it falls into the exception for information that would allow for an accurate inference of non-negotiated third party business information, IET does not believe that an accurate inference could be made. This is because, in order to arrive at the non-negotiated third party business information, a number of estimates and assumptions must first be made. As the non-negotiated third party business information cannot be directly determined from the information in the MOU, IET submits that it is unlikely that an accurate inference could be made.

IV ISSUES

- [9] Is the test for withholding the noted information under section 39 met?
- a. Is there sufficient evidence that the release of the information would allow an accurate inference to be made with regard to non-negotiated third party information?
 - b. If the release of the information would allow for an accurate inference of non-negotiated third party information, is there detailed and convincing evidence that this release would lead to an identifiable harm?

V DECISION

- [10] Section 39(1) of *ATIPPA, 2015* states:

39.(1) The head of a public body shall refuse to disclose to an applicant information

(a) that would reveal

- (i) trade secrets of a third party, or*
- (ii) commercial, financial, labour relations, scientific or technical information of a third party;*

(b) that is supplied, implicitly or explicitly, in confidence; and

(c) the disclosure of which could reasonably be expected to

- (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,*
- (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,*
- (iii) result in undue financial loss or gain to any person, or*
- (iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.*

- [11] Section 39 is a mandatory exception to the right of access under *ATIPPA, 2015* and consists of a three-part test. All three parts must be satisfied and third party complainants bear the burden of proof, pursuant to section 43. Failure to meet any part of the test will result in disclosure of the requested records.

[12] It is acknowledged by the Third Party, IET, and this Office that the release of the proposed redacted information would reveal the commercial or financial information of the Third Party as required by section 39(1)(a)(ii) of *ATIPPA, 2015*. As such, the first part of the test is satisfied.

[13] It is also acknowledged by all parties that the general rule is that information contained in negotiated agreements between third parties and public bodies cannot be considered to be “supplied” as required by section 39(1)(b). The information in question forms part of a negotiated contact, and therefore this part of the test would not be satisfied and, normally, the information would need to be released; However, as noted above, the Third Party has made an additional argument under this step of the test. This argument is that the release of the negotiated information would allow for an accurate inference of non-negotiated third party business information.

[14] For this argument to succeed, it is necessary that an accurate inference could be made from the negotiated information. The Third Party has not provided evidence that an accurate inference could be made other than to assert that they believe it could. Based on the information and arguments provided, this Office cannot conclude there is a risk that an accurate inference could be made. In order to make an inference regarding the net income of the business from the information in the MOU, various assumptions and estimates for several metrics would have to be made. Even if this were attempted, there is no information within the MOU which could be relied on to verify the accuracy of these estimates and assumptions. I do not consider it likely that even an assiduous inquirer would be able to use the information in the MOU to calculate sensitive business information – there is far too much uncertainty to meet the standard required for the exception. Therefore, the second part of the three-part test is not met.

[15] As all three parts of the test in section 39 must be met in order to justify withholding third party business information, and the second part has not been met, there is no need to continue the analysis further.

VI RECOMMENDATIONS

- [16] Under the authority of section 47 of *ATIPPA, 2015*, I recommend that the Department of Industry, Energy and Technology release the Memorandum of Understanding to the Applicant with only the agreed upon figure redacted.
- [17] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of the Department of Industry, Energy and Technology must give written notice of his or her decision with respect to these recommendations to the Commissioner and any person who was sent a copy of this Report within 10 business days of receiving this Report.
- [18] Records should be disclosed to the Applicant on the expiration of the prescribed time for filing an appeal unless the Third Party Complainants provide the Department with a copy of their notices of appeal prior to that time. Should an appeal be filed by the Third Party, I recommend the release of the MOU with the disputed portions redacted until such time that the Courts make a decision.
- [19] Dated at St. John's, in the Province of Newfoundland and Labrador, this 19th day of May 2022.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador